No. 91-5771

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

HAROLD RAY WADE,
Petitioner

v.

UNITED STATES

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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JOINT APPENDIX

J. MATTHEW MARTIN
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Washington, D.C. 20530
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PETITION FOR WRIT OF CERTIORARI FILED SEPTEMBER 10, 1991
WRIT OF CERTIORARI GRANTED DECEMBER 9, 1991

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
11/28/91	Indictment
12/4/89	Arraignment
12/14/89	Motion to suppress filed. Motion for severance filed. Motion for increase of peremptory challenges filed.
12/18/89	Government's responses to motions filed.
3/5/90	Plea change.
3/7/90	Plea change.
4/9/90	Defendant position with regard to sentencing factors filed.
5/11/90	Sentencing hearing.
5/14/90	Judgment Order filed.
5/18/90	Notice of appeal filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

CR-89-278-01-G
CR-89-278-02-G
CR-89-278-03-G

UNITED STATES OF AMERICA

v.

HAROLD RAY WADE, JR., DWIGHT MARKS,
also known as "Rabbit," TERRI MICHELLE EDWARDS

The Grand Jury charges:

COUNT ONE

From on or about October 25, 1989, up to and including October 30, 1989, in the Middle District of North Carolina, and elsewhere, HAROLD RAY WADE, JR., DWIGHT MARKS, also known as "Rabbit," TERRY MICHELLE EDWARDS, and divers other persons, known and unknown to the Grand Jurors, knowingly and intentionally did unlawfully conspire, combine, confederate and agree together and with each other to commit offenses against the laws of the United States, that is:

1. To willfully, intentionally, and unlawfully possess with intent to distribute quantities of cocaine hydrochloride, a Schedule II, narcotic controlled substance within the meaning of Title 21, United States Code, Section 812, in violation of Title 21, United States Code, Section 841(a)(1).

2. To willfully, intentionally, and unlawfully distribute quantities of cocaine hydrochloride, a Schedule II, narcotic controlled substance within the meaning of Title 21, United States Code, Section 812, in violation of Title 21, United States Code, Section 841(a)(1).

All in violation of Title 21, United States Code, Sections 846 and 841(b)(1)(B).

OVERT ACTS

In furtherance of the aforesaid conspiracy and to effect the objects and purposes thereof, HAROLD RAY WADE, JR., DWIGHT MARKS, also known as "Rabbit," TERRY MICHELLE EDWARDS, and others committed numerous overt acts in the Middle District of North Carolina and elsewhere, including but not limited to the following:

1. On or about October 25, 1989, HAROLD RAY WADE, JR., and DWIGHT MARKS, also known as "Rabbit," traveled from the Middle District of North Carolina to the Southern District of Florida for the purpose of purchasing cocaine for subsequent resale in the Middle District of North Carolina.

2. On or about October 25, 1989, HAROLD RAY WADE, JR., and DWIGHT MARKS, also known as "Rabbit," met with TERRI MICHELLE EDWARDS, an acquaintance of DWIGHT MARKS, for the purpose of arranging the purchase of cocaine hydrochloride for subsequent resale in the Middle District of North Carolina.

3. On or about October 25, 1989, HAROLD RAY WADE, JR., purchased approximately one kilogram and ten ounces of cocaine from TERRI MICHELLE EDWARDS for subsequent resale in the Middle District of North Carolina.

4. On or about October 27, 1989, HAROLD RAY WADE, JR., and DWIGHT MARKS, also known as "Rabbit," returned to the Middle District of North Caro-

lina from the Southern District of Florida in possession of the aforesaid cocaine purchased from TERRI MICHELLE EDWARDS.

5. On or about October 27, 1989, in the Middle District of North Carolina, HAROLD RAY WADE, JR., gave approximately two ounces of the aforesaid cocaine to DWIGHT MARKS, also known as "Rabbit," as compensation for facilitating the purchase of said cocaine from TERRI MICHELLE EDWARDS.

6. On or about October 30, 1989, in the Middle District of North Carolina, HAROLD RAY WADE, JR., distributed approximately one ounce of cocaine hydrochloride to another individual.

COUNT TWO

On or about October 30, 1989, in the County of Caswell, in the Middle District of North Carolina, HAROLD RAY WADE, JR., willfully, knowingly and intentionally did unlawfully possess with intent to distribute 951.8 grams (net weight) of cocaine hydrochloride, a Schedule II, narcotic controlled substance within the meaning of Title 21, United States Code, Section 812; in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(B).

COUNT THREE

On or about October 30, 1989, in the County of Caswell, in the Middle District of North Carolina, HAROLD RAY WADE, JR., willfully, knowingly and intentionally did unlawfully distribute 27.1 grams (net weight) of cocaine hydrochloride, a Schedule II, narcotic controlled substance within the meaning of Title 21, United States Code, Section 812; in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(C).

COUNT FOUR

On or about October 30, 1989, in the County of Caswell, in the Middle District of North Carolina, HAROLD RAY WADE, JR., during and in relation to a drug trafficking crime for which he could be prosecuted in a court of the United States, that is, conspiracy to possess with intent to distribute and to distribute cocaine hydrochloride, in violation of Title 21, United States Code, Section 846, and possession with intent to distribute cocaine hydrochloride and the distribution of cocaine hydrochloride, in violation of Title 21, United States Code, Section 841(a)(1), did carry and use two firearms, that is, a Ruger .357 magnum revolver, Serial Number 161-55480, and a Springfield Armory .45 caliber handgun, Serial Number 36179; in violation of Title 18, United States Code, Section 924(c)(1).

A TRUE BILL:

/s/ Susan Childress
Foreman

/s/ Robert H. Edmund, Jr.
United States Attorney

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

[Title Omitted in Printing]

TRANSCRIPT OF SENTENCING

THE HONORABLE N. CARLTON TILLEY, JR., PRESIDING

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[2]

PROCEEDINGS

MR. GLASER: Your Honor, calling United States v. Harold Ray Wade, Junior, CR-89-27-01-G. Mr. Wade is represented by Mr. Matthew Martin, and Mr. Wade is on for sentencing today.

THE COURT: Good morning. Mr. Martin.

MR. MARTIN: Good morning, Judge.

MR. GLASER: Your Honor, I've been notified I caught the marshal unaware, and they are bringing him up posthaste.

(Defendant entered the courtroom)

THE COURT: Mr. Martin, you have had ample opportunity to review the presentence report?

MR. MARTIN: Yes, I have, Your Honor.

THE COURT: And you discussed it with Mr. Wade?

MR. MARTIN: Yes, I have, Your Honor.

THE COURT: And do you take issue with any of the findings or recommendations set out in the presentence report?

MR. MARTIN: Well, we did originally, Judge. I filed the documents. I have been apprised of the court's tenta-

tive findings, and I believe if I can confer briefly with Mr. Wade on those—I have not been able to confer with him about those—I believe they may resolve all the questions I have about the presentence report. May I have [3] just one moment?

THE COURT: Surely.

MR. MARTIN: Your Honor, I have relied on a case with regard to obstruction of justice which I believe I misplaced, and I would withdraw my reliance on that. And I believe the court's tentative finding on both obstruction of justice and acceptance of responsibility are correct.

So as far as that aspect of the presentence report goes, I believe I have no objections at this point. There is one issue I would like to bring up to the court. It's not—and I hope you don't feel like I'm just rerunning through the—

THE COURT: Well, let me ask you a question though.

MR. MARTIN: Yes, sir.

THE COURT: What difference does it really make? Aren't we talking about a mandatory ten-year sentence?

MR. MARTIN: We are.

THE COURT: And then a mandatory 60 months to follow that? So doesn't the guideline range sort of—

MR. MARTIN: You're exactly right. But I believe it's—and in May of 1990 I believe that it really doesn't make—I'm sort of splitting hairs to argue about the guideline range when you have a mandatory minimum sentence. However, we're talking about a period of substantial incarceration for Mr. Wade. And the law may change, and it may be that something that I do or don't do now may come to [4] affect him in some number of years. And so I think it's important at this stage for me at least to treat every issue that I think is treatable before the court.

But without belaboring that, I would say that I believe that your tentative findings are appropriate and Mr. Wade, after consultation, and I agree with that.

One issue really that I would like to bring before the court today is not so much a presentence report, because I think it's a very good presentence report. It is, again, a question of the, I suppose, the prosecutorial function—and I don't mean to be critical, and I also don't want you to feel like you are watching a rerun of the past sentencing.

I heard the court say that the court feels that the Sentencing Commission in its wisdom has delegated the responsibility of determining the qualitative/quantitative effect of any cooperation by a defendant to the prosecution, and you personally or as the court—not you personally—but the court feels that you have no real leeway in that regard. And—I was listening very carefully.

I would point the court to paragraphs 9 and 10 of the presentence report. And with regard to Mr. Wade's cooperation in this very case, and I would argue maybe—my argument is that in Section 5K2.0 of the Guidelines, which is the general provisions of departure and policy, as well as in Title 18, United States Code, Section 3553(a)1 and 3553(b), [5] the court is allowed to take into consideration items and information in evidence which, if it considers them not to have been treated or if it considers them to have been not adequately taken into consideration by the Sentencing Commission—and my argument to you is that there is evidence in the presentence report, evidence which I believe I can present via special agent's testimony that would indicate that there is a level of cooperation in this case that, although the Government in its wisdom chose not to grant substantial assistance to, may have not been adequately taken into consideration by the Sentencing Commission, that this type of evidence might allow for a downward departure.

THE COURT: Well, you contend it would allow for a departure below the statutory minimum?

MR. MARTIN: I believe that if the government were to make that motion—

THE COURT: Yes, sir, absolutely, the government, but that's by statute. But you contend that I just without that motion could decide that Mr. Wade had provided substantial assistance to somebody, that I could come below the statutory minimum?

MR. MARTIN: I believe that you could. I do not have a—I do not have a case to cite to you on that.

THE COURT: Well, I believe I'm going to let you make some law with that case because I do not believe so, and [6] I hold I do not have that authority. You may appeal that belief that I feel I would—that I am imposing this sentence contrary to law because I don't believe that I can depart upon your motion for substantial assistance below the mandatory minimum.

MR. MARTIN: Well, now, I do not—

THE COURT: I will tell you that I would anticipate sentencing at the minimum with regard to the conviction. And I don't know what further argument really regardless of what happens in the future—you know, I'm not going to impose a sentence, if this were strictly Guidelines, I would impose X, but because it's not Guidelines, I'm going to impose the statutory minimum of Y. I've never heard of a sentence like that before.

MR. MARTIN: I don't want—I believe I do not have the standing to make a motion for substantial assistance. I think the only thing that I can say is that the lack of the government—in the absence of the government's motion in this case for substantial assistance, the absence of that motion, is a factor which the Sentencing Commission would not—could not have taken into effect given the level of cooperation in this case. That's my argument.

THE COURT: But, I mean, we're not talking about the Sentencing Commission either. We're talking about [7] mandatory minimums, aren't we?

MR. MARTIN: Exactly. But—

THE COURT: Did the Sentencing Commission say you can come downward from a mandatory minimum or does that have to be a congressional—there is a statute which indicates you can, so I guess we're really jousting with a windmill over that. But I don't think a downward departure, the term "downward departure" in the Guidelines comprehends coming below the mandatory minimum of the statute.

MR. MARTIN: Well, in that regard, then, would it be appropriate for me to put on evidence at this point or are you ruling basically on my grounds for making this—

THE COURT: I'm ruling on your grounds.

MR. MARTIN: Well, then, I don't—I believe that I'm being cut off before I get to that point, and so if I—

THE COURT: That's what I'm saying. You may appeal on my ruling.

MR. MARTIN: Then I think that would be appropriate rather than for me to have extensive sort of replay of where we've been earlier in the day.

THE COURT: You may state for the record, in the event you desire to appeal that, what the evidence would be.

MR. MARTIN: The evidence—I will do that. Other than the evidence, which is quite correct that's in the presentence report in paragraphs 9 and 10, the evidence would [8] be that Mr. Wade met on, I believe, several occasions with Agent Deignan of the Drug Enforcement Administration, that he was of assistance in beginning an investigation which led to the arrest of an unrelated person, a person not in this conspiracy. That arrest and case is going on in state court now, and to my knowledge has not been resolved as of yet. Mr. Wade played an instrumental role in that case.

And that, additionally, Mr. Wade has offered to cooperate further in that case. And that, additionally, he has provided other assistance in the nature of identification of other people suspected of drug crimes in the Middle District.

THE COURT: All right, sir.

MR. MARTIN: That would be our proffer.

THE COURT: And it is my understanding that should his cooperation and assistance with the government reach the level required by the United States Attorney's Office, that they may still come in within the next year and file a motion for substantial assistance and a consideration of having his sentence reduced below the mandatory minimum.

MR. MARTIN: I believe that's a Rule 35 motion, that's correct. And it may—that may well obviate the necessity for us to litigate this issue further. But I wanted to bring it before the court.

THE COURT: Thank you, sir.

[9] MR. MARTIN: Other than that—excuse me one moment.

Other than that, Your Honor, I believe this is a very good presentence report.

THE COURT: Okay. As I say, I anticipate, Mr. Martin—I don't mean to cut your argument short—but I would anticipate imposing a sentence of 120 months, and then the 60 months mandatory, eight year supervised release.

MR. MARTIN: With that in mind, Judge, I would like to just tell you briefly a little bit about my client. Mr. Wade is not a malevolent or bad or mean person. I believe that his own substance abuse problems pulled him into this. I think he will tell you that his own greed, though, is what—greed and stupidity is what carried him on.

To be frank, up until the point of this case, Judge, Mr. Wade was not in the big leagues. I think he would tell you truthfully this is the first kilogram-level transaction he was ever involved in. He was arrested on it almost immediately. So he is not a very sophisticated person compared with some of the traffickers that come before the court.

He is actually a very pleasant, nice person. He has a very nice family, and I would let the court know they are here today. They have been very supportive of him. They are—he doesn't come from a broken home; he comes from two [10] very hard-working parents. I think he feels very badly about, not just about this offense, but about the whole portion of his life that led up to him being here today.

He is an intelligent person, he is—and when I say his greed led him to this, I don't mean that he was consumed by it. But foolhardiness and greed together sometimes can lead to make very, very terrible mistakes.

I believe Mr. Wade knows that if he ever—when this sentence is over—if he ever returns to federal court, that he will be a career defendant and will go away for decades. And I don't believe that he will ever be in this position again. I don't. I think he has some things he would like to tell you.

THE COURT: Sure.

MR. MARTIN: And I appreciate the frankness of our discussion today.

THE COURT: Thank you, Mr. Martin.

Mr. Wade, be glad to hear whatever you would like to say.

THE DEFENDANT: Yes, sir. I know I've noticed since I've been in jail, I see now—I wish I knew now what I knew before. I mean, I wish I knew before what I know now about cocaine, like deceitfulness and lies and untruthfulness that comes along with it.

In jail I've got to see some of that, some of the [11] corruptness that I was causing that I sort of put behind in my mind that I really didn't want to, you know, really realize it. But now I see what I was doing to the community. It's sort of like a false, if you may, it's sort of like a false god a lot of people were deceived into following. I was one of those people.

You know, it's a lot of lies and all that goes along with cocaine. And I just, I wish I never had gotten involved

with it, especially, I feel like I've really been, I've deceived my parents, my little girl, myself, you know, in following this god. I wish I never had really gotten involved in it. I just wish I had stayed clear of it.

In 1985 I think my record will show that I got busted for felony possession of marijuana. I wish then that I would have got some time so I could have realized the nature of my crime then so I wouldn't have gotten back into it. But I did. So then that led me to go right back into it, which I wish I never would have done it.

And the only thing I can really say now is that I'm really sorry for ever really getting into it. It's not only because of my habit, but it was for greed and material possessions that led me into this thing. And that's all I have to say to the court.

THE COURT: Thank you, Mr. Wade.

Mr. Glaser, do you care to be heard?

[12] MR. GLASER: No, Your Honor.

THE COURT: Mr. Wade, I agree that it really is a, sitting in court from one day to the next, and it seems like about all we see is cocaine cases or crack cases or case where people have stolen or robbed to get money to procure cocaine or crack. There is so much heartbreak. Not just your family, but so many others.

You're an intelligent person. You're a very articulate person. And it really is heartbreaking to see somebody who could make such a contribution to society as you have to be where, for a long time, you can't. And it's obvious you do care about your family. It's obvious from that letter that surfaced the day that we were going to trial on the gun charge that you even in that letter had great concern for your family. And I'm sure they share that concern for you or they wouldn't be here today.

As I've told Mr. Martin, I feel that—I have no choice in this case. The statutes set the minimum which you can receive. And that's what I intend to impose. But I hope you are able to fashion the time that you do spend incarcerated maintaining the attitude when you do come out,

you will be the positive force on society that you really should be right now or that your family would like you to be right now.

It is the judgment of the court that Mr. Wade be committed to the custody of the Bureau of Prisons on Counts [13] One, Two, and Three for a period of 120 months, to be followed by a period of eight years supervised release.

It is further ordered that pursuant to Count Four, he be sentenced to the custody of the Bureau of Prisons for a period of 60 months to commence at the expiration of the sentence entered under Counts One, Two, and Three.

The statutory or the supervised release term under Count Four will merge with that eight years previously entered.

It is determined that a special assessment of $200, which is $50 per count, must be paid. But that because of Mr. Wade's financial situation, that no fine will be entered because he is incapable of paying a fine and will not be for a while.

I wish you the best in keeping up that attitude.

THE DEFENDANT: Yes, sir.

THE COURT: Thank you.

MR. MARTIN: Judge, if I may, there is one item Mr. Wade has asked me to ask you about. I believe it's automatic, but to make him feel better, I will ask that the time he spent incarcerated since October, I believe, be credited towards his sentence.

THE COURT: It is my understanding that is automatic. That's nothing I have authority to control. But it is my understanding that is automatic. You will receive full credit for your time spent.

[14] MR. MARTIN: Judge, one final item. There was some property seized from Mr. Wade that he was administratively notified that it had been subject to forfeiture, and his family is handling that. There were some items seized which have neither been returned nor have been notified that they are the subject of forfeiture provisions.

And I wonder if the court has anything that it can do to either request that they be returned to the family or that the government be required to move forward on the forfeiture?

THE COURT: Mr. Martin, I don't even know what you're talking about, and I know of nothing—I suppose you could file a legal action to compel a return if the government is not going to seek forfeiture. But that would be a separate proceeding I would think.

MR. MARTIN: Well, I understand that. We did have that concern. It is not a great—it is some recreational vehicles. It is not a great amount of property.

THE COURT: Mr. Glaser may have knowledge of that and be able to share that knowledge with you at this time.

MR. MARTIN: Well, Mr. Francis is the prosecutor in this case.

MR. GLASER: Your Honor, I invite Mr. Martin up to our office immediately following this hearing so we can talk about it. Possibly Mr. Robertson could probably have a better handle on the forfeiture aspect.

[15] THE COURT: Fine. I appreciate that.

MR. MARTIN: Thank you very much.

I'm returning the presentence report that I have.

Mr. Wade, do you have part of yours?

THE COURT: Excuse me, Mr. Martin. I did not—as special conditions of supervised release, Mr. Johnson reminds me I did not make my usual findings.

Mr. Wade, during your supervised release period, it is ordered that you submit to any substance abuse testing directed by the probation officer, which may include such things as urinalysis. Also, if the probation officer feels that you should participate in some substance abuse treatment program, that you must participate in whatever treatment program is recommended by the probation officer. That will be the only conditions.

MR. MARTIN: Thank you very much, Judge. I'm returning my presentence report to Mr. Johnson.

THE COURT: Thank you.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

[Title Omitted in Printing]

JUDGMENT INCLUDING SENTENCING UNDER THE SENTENCING REFORM ACT

[Filed May 14, 1990]

J. Matthew Martin, Defendant's Attorney.

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 through 4.

☐ was found guilty on count(s) —— after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21:846, 841(a)(1) & (b)(1)(B)	Conspiracy: To possess with intent to distribute and to distribute cocaine hydrochloride, a Schedule II, narcotic controlled substance.	1
21:841(a)(1) & (b)(1)(B)	Possess with intent to distribute cocaine hydrochloride.	2
21:841(a)(1) & (b)(1)(C)	Distribute cocaine hydrochloride.	3
18:924(c)(1)	Carry and use firearms in drug trafficking crimes.	4

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on counts(s) ——, and is discharged as to such count(s).

☐ Count(s) —— (is) (are) dismissed on the motion of the United States.

☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

☒ It is ordered that the defendant shall pay to the United States a special assessment of $200.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number.
242-17-2856

Defendant's mailing address:
Route 1, Box 357-A
Gibsonville, NC

May 10, 1990
Date of Imposition of Sentence

/s/ N. Carlton Tilley, Jr.
Signature of Judicial Officer

N. CARLTON TILLEY, JR.
U.S. District Judge
Name & Title of Judicial Officer

May 11, 1990
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United Bureau of Prisons to be imprisoned for a term of one hundred twenty (120) months on Counts 1 through 3 consolidated; sixty (60) months on Count 4 to begin at the expiration of the sentence imposed on Counts 1 through 3 consolidated.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district,

☐ at ——— a.m. / p.m. on ———.

☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

☐ before 2 p.m. on ———.

☐ as notified by the United States Marshal.

☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows: ———

Defendant delivered on ——— to ——— at ———, with a certified copy of this Judgment.

———
United States Marshal

By ———
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of eight (8) years on Counts 1 through 3.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

1. Submit to substance abuse testing which may include urinalysis, as directed by the U.S. Probation Officer; and
2. If the U. S. Probation Officer feels the defendant should participate in any substance abuse treatment program, he shall do so as directed.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

[Title Omitted in Printing]

NOTICE OF APPEAL

[Filed May 18, 1990]

Notice is hereby given that Harold Ray Wade, defendant above-named, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the Judgment and Commitments entered into in this matter on the 10th day of May, 1990.

Respectfully submitted, this the 16th day of May, 1990.

/s/ J. Matthew Martin
J. MATTHEW MARTIN
N.C. State Bar No. 13597

Of Counsel:

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102 North Churton Street
Hillsborough, North Carolina 27278
(919) 732-6112

[Certificate of Service Omitted in Printing]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-5805

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

HAROLD RAY WADE, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Norwood Carlton Tilley, Jr., District Judge. (CR-89-278-G)

Argued: February 8, 1991 Decided: June 12,1991

Before ERVIN, Chief Judge, NIEMEYER, Circuit Judge, and SPENCER, United States District Judge for the Eastern District of Virginia, sitting by designation.

NIEMEYER, Circuit Judge:

Following his guilty plea to charges for drug distribution and related gun use, Harold Ray Wade, Jr. was sentenced to a mandatory minimum ten-year sentence for the drug charges and a consecutive mandatory five-year sentence for the gun charge. *See* 21 U.S.C. § 841(b); 18

U.S.C. § 924(c). In denying Wade's motion for a downward departure based on his substantial assistance to the government, the district court concluded that, in the absence of a motion made by the government under U.S.S.G. § 5K1.1, it had no authority to depart from the mandatory minimum sentences.

On appeal, Wade contends that (1) the district court erroneously concluded that it did not have the authority to depart downward for substantial assistance on his motion, which was supported by substantial evidence of the valuable cooperation that he provided, and (2) the court should have permitted an inquiry into the government's reasons for its refusal to make the motion under § 5K1.1 to determine whether it acted arbitrarily or in bad faith. Finding no error, we affirm.

There appears to be no disagreement on the fact that shortly after his arrest and without the benefit of a plea agreement, Wade began a course of cooperation which provided valuable assistance to the government in other prosecutions, leading to the conviction of co-conspirators. Yet, with some disillusionment, he observes that the government made no comment about his cooperation at sentencing and refused to file a motion for a downward departure under U.S.S.G. § 5K1.1. Wade brought these facts to the attention of the district court in connection with his motion for a downward departure and sought unsuccessfully to inquire of the government why it refused to make the motion. He argues that such an inquiry would have been relevant to resolve whether the government acted arbitrarily or in bad faith.

Limited authority to depart from mandatory minimum sentences is provided in 18 U.S.C. § 3553(e), which provides:

> Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

See also 28 U.S.C. § 994(n) ("The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed."); U.S.S.G. § 5K1.1. Section 5K1.1 governs all departures from guideline sentencing for substantial assistance, and its scope includes departures from mandatory minimum sentences permitted by 18 U.S.C. § 3553(e). *See* Application Note 1 to § 5K1.1; *United States v. Keene*, —— F.2d ——, No. 89-50617 (9th Cir. Apr. 29, 1991). The unambiguous language of 18 U.S.C. § 3553(e) leads to the single conclusion that courts may not depart downward from mandatory minimum sentences because of the substantial assistance of a defendant unless the government files a motion for departure. *See, e.g., United States v. Francois*, 889 F.2d 1341, 1345 (4th Cir. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 1822 (1990); *United States v. Huerta*, 878 F.2d 89, 91 (2d Cir. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 845 (1990). The policy of § 3553(e) is "to provide an incentive to defendants to furnish assistance to law enforcement officials" by giving the officials the right to introduce flexibility into the otherwise rigorous inflexibility of mandatory sentences. *United States v. Daiagi*, 892 F.2d 31, 32 (4th Cir. 1989). Although the *quid pro quo* of the policy involves only law enforcement officials and defendants, once a motion by the government is filed, the court must exercise discretion in determining the appropriate level of departure, which may, when justified by the facts, be more or less than that recommended by the government. *See United States v. Wilson*, 896 F.2d 856, 859 (4th Cir. 1990) (Sentencing Commission has not

limited the district court's authority in determining the amount of a departure under § 3553(e)); *United States v. Musser*, 856 F.2d 1484, 1487 (11th Cir. 1988) (although the government is given the authority to *make the motion* for a reduction of sentence for the defendant's substantial assistance, the actual authority to reduce the sentence remains vested in the district court), *cert. denied*, 489 U.S. 1022 (1989). The plain statutory language, however, permits the court's consideration of downward departures for substantial assistance only after the government has made the motion. Therefore, the argument by Wade that the sentencing court is authorized to depart downward on his motion, but in the absence of a government motion, must be readily rejected.

The more difficult question raised by Wade is whether he may query the good faith of the government in refusing to make the motion. He argues that the district court should have reviewed not only the strength of the evidence showing the value of his assistance but also the reasons and motives of the government in not making the motion. Relying on *United States v. Justice*, 877 F.2d 664 (8th Cir.), *cert. denied*, —— U.S. ——, 110 S.Ct. 375 (1989), he argues that the good faith of the government must be reviewable by the court so that the expressed Congressional policy of rewarding cooperation is not thwarted. *See* 28 U.S.C. § 994(n).

In *Justice*, where a similar argument was made, the court affirmed the district court's refusal to depart downward in the absence of a motion by the government made under U.S.S.G. § 5K1.1. In doing so, however, the court acknowledged the potential for an argument as made here by Wade:

> We believe that in an appropriate case the district court may be empowered to grant a departure notwithstanding the government's refusal to motion the sentencing court if the defendant can establish the fact of his substantial assistance to authorities as outlined above. Nevertheless, we are not prepared to decide this issue based on the record currently before us.
>
> Thus, while we are inclined to hold that a motion by the government may not be necessary in order for the sentencing court to consider a departure based on substantial assistance to authorities, we need not reach this issue.

Id. at 668-69. Justice's argument was based on the notion that 28 U.S.C. § 994(n) directs the Commission to "assure" that the Sentencing Guidelines recognize substantial assistance, and if U.S.S.G. § 5K1.1 were interpreted to deny the court's review of the government's determinations on this issue, the Congressional mandate could be frustrated. The court left the issue open, citing *United States v. White*, 869 F.2d 822 (5th Cir.), *cert. denied*, 490 U.S. 1112 (1989), where the court observed that although it would be "the rarest of cases" in which the government would improperly fail to recognize substantial assistance, § 5K1.1 "obviously does not preclude a district court from entertaining a defendant's showing that the government is refusing to recognize such substantial assistance." *Id.* at 829.

The Eighth Circuit revisited the question in *United States v. Smitherman*, 889 F.2d 189 (8th Cir. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 1493 (1990), and again acknowledged the possibility that it would be willing to review a government's refusal to make a motion for a downward departure in the right circumstances.

> In this case, the government made no such motion. Although we have suggested that a section 5K1.1 motion might not be necessary in all cases [*citing United States v. Justice*], we do not view the present case as one that presents a question of prosecutorial bad faith or arbitrariness that might conceivably present a due process issue.

Id. at 191.

Our reading of 18 U.S.C. § 3553(a) and 28 U.S.C. § 994(n), however, leads us to the conclusion that the government alone has the right to decide, in its discretion, whether to file a motion for a downward departure based on the substantial assistance of a defendant. The statutory purpose of promoting defendants' cooperation with the government and the statutory restriction that departures may be considered only on the motion of the government require an interpretation that the right to introduce flexibility into what is otherwise a mandatory sentence is given to the government for use as a prosecutorial tool which may be exercised in the sole discretion of the government. Moreover, neither 18 U.S.C. § 3553(e) nor 28 U.S.C. § 994(n) bestows on a defendant a beneficial interest that may be enforced as a right. By giving the right to request a downward departure from mandatory minimum sentences exclusively to the government, § 3553(e) of logical necessity excludes any claim of right by a defendant to demand that a motion for a departure be filed upon his unilaterally initiated cooperative efforts. *See United States v. Daniels*, 929 F.2d 128, 131 (4th Cir. 1991) ("In the absence of an agreement requiring the government to file [a § 5K1.1 motion for substantial assistance] the defendant has no right to demand that one be filed.").

Once we reach the conclusion that the government has the sole discretion in deciding whether to file a motion for downward departure for substantial assistance, it follows that the defendant may not inquire into the government's reasons and motives if the government does not make the motion. To conclude otherwise would result in undue intrusion by the courts into the prosecutorial discretion granted by the statute to the government.

The avenue open to a defendant for taking advantage of 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1 is to negotiate a plea agreement with the government under which the defendant agrees to provide valuable cooperation for

the government's commitment to file a motion for a downward departure. When a defendant is able to negotiate a plea agreement that includes the government's agreement to file a motion for a downward departure under § 5K1.1, the defendant obtains rights to require the government to fulfill its promise. To those circumstances we apply the general law of contracts to determine whether the government has breached the agreement. *See United States v. Connor*, 930 F.2d 1073, —— (4th Cir. 1991). If substantial assistance is provided and the bargain reached in the plea agreement is frustrated, the district court may then order specific performance or other equitable relief, or it may permit the plea to be withdrawn. *Id.* at ——. *Cf. Santobello v. New York*, 404 U.S. 257, 262 (1971) ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.").

While the government may have legitimate prosecutorial interests in choosing to negotiate a plea agreement and settle a prosecution with a defendant short of trial, it may also insist on a full prosecution and trial if it chooses not to negotiate or agree to terms of a plea agreement satisfactory to the defendant. The defendant's right is to be prosecuted and tried in accordance with the standards of due process and not to be given an agreement of compromise.

We therefore hold that, absent a motion filed by the government, the district court has no authority to depart downward from a mandatory minimum sentence for the substantial assistance of the defendant, and the defendant is not entitled to an explanation for the government's refusal to make the motion or for its refusal to enter into an agreement to make the motion. The judgment of the district court is therefore affirmed.

AFFIRMED

SUPREME COURT OF THE UNITED STATES

No. 91-5771

HAROLD RAY WADE,
Petitioner

v.

UNITED STATES

ORDER ALLOWING CERTIORARI

Filed December 9, 1991

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

December 9, 1991